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NO. 91-599

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DONALD CALLIHAN, dba S.H.E. VIDEO
TRM CORPORATION, dba NETWORK VIDEO
and
RANDY SCHILOT,

Petitioners,

vs.

STATE OF OHIO

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, FAIRFIELD COUNTY, OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION MANDATE A PRIOR JUDICIAL DETERMINATION OF PROBABLE CAUSE TO BELIEVE THAT EXPRESSIVE MATERIALS ARE OBSCENE BEFORE THESE MATERIALS MAY BE SUBMITTED TO A GRAND JURY BY A PROSECUTOR TO OBTAIN AN INDICTMENT AND BEGIN A CRIMINAL PROSECUTION.

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PETITION FOR WRIT IN A CRIMINAL CASE

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the items presented by petitioners, respondent cites the following relevant constitutional provisions, statutes, and regulations:

1. The Fourth Amendment, United States Constitution which provides:

AMENDMENT IV

The right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched,and the persons or things to be seized.

2. Section 2939.08, Ohio Revised Code which provides that:

Section 2939.08 Duty of grand jury.

After the charge of the court of common pleas, the grand jury shall retire with the officer appointed to attend it, and proceed to inquire of and present all offenses committed within the county.

3. Rule 7 of the Ohio Rules of Criminal Procedure which provides that:

(A) Use of indictment or information. A felony which may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against him and of his right to indictment, he may waive that right in writing and in open court.

Where an indictment is waived the offense may be prosecuted by information, unless an indictment is filed within fourteen days after the date of waiver. If an information or indictment is not filed within fourteen days after the date of waiver, the defendant shall be discharged and

the complaint dismissed. This subdivision shall not prevent subsequent prosecution by information or indictment for the same offense.

A misdemeanor may be prosecuted by indictment or information in the court of common pleas, or by complaint in courts inferior to the court of common pleas. An information may be filed without leave of court.

(B) Nature and contents. The indictment or the information shall be signed by the prosecuting attorney or signed in his name by an assistant prosecuting attorney, and shall contain a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the applicable section of the statute as long as the words of that statute charge an offense, or in any words sufficient to give the accused notice of all the elements of the offense with which he is charged. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. Each count of the indictment or information shall state the numerical designation of the statute which the defendant is alleged therein to have violated. Error in the designation or its omission shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not mislead the defendant to his prejudice.

(C) Surplusage. The court on motion of the defendant or the prosecuting attorney may strike surplusage from the indictment or information.

(D) Amendment of indictment, information or complaint. The court may at any time before, during, or after a trial amend the indictment, information, complaint or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information or complaint, or to cure a variance between the indictment, information or complaint and the proof, the accused is entitled to a discharge of the jury on his motion, if a jury has been impanelled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this subdivision, jeopardy shall not attach to the offense charged in the amended indictment, information or complaint. No action of the court in refusing a continuance or postponement under this subdivision is reviewable except after motion to grant a new trial therefor is refused by the trial court, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole

proceedings, the reviewing court finds that a failure of justice resulted.

(E) Bill of particulars. When the defendant makes a written request within twenty-one days after arraignment but not later than seven days before trial, or upon court order, the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charged and of the conduct of defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires.

STATEMENT OF THE CASE

The statement of the case is adequately set forth in the petition.

SUMMARY OF ARGUMENT

Undercover Fairfield County deputy sheriffs rented videotapes from petitioners, made duplicate copies for evidentiary purposes, and returned the videotapes during the rental period. The videotapes were then shown to the Fairfield County Grand Jury which returned indictments against petitioners for pandering obscenity in violation of Ohio Revised Code Section 2907.32.

Respondent can find no authority for the petitioners' contention that a prior judicial determination of obscenity is required before a grand jury can issue an indictment. The mere rental of videotapes is not an impermissible seizure. Accordingly, the trial court improperly dismissed the indictment in this case as the requested prior judicial intervention is not mandated by statute or criminal rule.

REASONS WHY THE PETITION SHOULD BE DENIED

Ohio grand juries may issue indictments for violations of Ohio Revised Code Section 2907.32 without a prior judicial determination of probable cause. Petitioners have failed to document any statutory or case law to support their claim that first amendment cases must be treated differently.

Ohio Revised Code Section 2939.08 authorizes grand juries to inquire of and present all offenses committed within the county. Ohio Criminal Rule 7 provides that "A misdemeanor may be prosecuted by indictment or information in the court of common pleas." An indictment may be found only upon the concurrence of seven or more jurors. Ohio Criminal Rule 6(F).

The enormous scope of a grand jury's power was discussed by this Court in the case of *United States v. Calandra*, 414 U.S. 338 (1974):

> Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. *Id.*, at 343.

Respondent concurs with the assessment by the Petitioners that the only issue in this case involves the degree of and need for judicial oversight constitutionally

mandated before a prosecution for pandering obscenity can be commenced. However, Petitioners have yet to detail the specific authority behind their position on this issue.

This Court has never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversarial hearing applicable to all cases where allegedly obscene material is seized. *Heller v. New York*, 413 U.S. 483, 488 (1973). The Ohio legislature has not mandated prior judicial scrutiny in obscenity prosecutions in either the Ohio Revised Code or the Criminal Rules. Therefore, there is no reason why the Petitioners should be granted a prior adversarial hearing when this procedure has not been mandated by the Ohio legislature.

The petitioners' argument implies that the mere indictment of an individual for pandering obscenity is an unlawful prior restraint on the freedom of expression. The facts of this case are distinguishable from the cases cited by petitioners.

A seizure is defined as a "meaningful interference with an individual's possessory interests." *Maryland v. Macon*, 472 U.S. 463, 469 (1985) Therefore an undercover officer who rents allegedly obscene videotapes does not violate the Fourth Amendment by accepting an offer to do business that is also freely made to the public. *Id.* By renting the videotapes to the undercover officer, the Petitioners voluntarily transferred any possessory interest during the extent of the rental period in exchange for the rental fee. Thus, when a law enforcement officer acquires an allegedly obscene item during the regular course of trade, no preliminary determination of obscenity is required because the item has not been seized. Under Ohio law, the case can then begin either with the signing of a complaint by the officer or by grand jury indictment. Ohio Criminal Rule 7.

This Court recently discussed the important difference between seizing an item by police officers or purchasing an item in connection with an investigation. The Court held: "We have previously rejected the argument that such purchases trigger constitutional concerns." *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46,62 (1989). In that case, the Court noted that "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding." *Id.,* at 463 (quoting *Heller v. New York,* 413 U.S. 483, 492 (1973)).

This Court discussed the stricter Fourth Amendment requirements for seizure of allegedly obscene materials in the case of *Roaden v. Kentucky,* 413 U.S. 496 (1973). However, this Court declined to require adversarial proceedings whenever allegedly obscene material is involved. In Headnote 5 this Court stated:

> 5. The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes stricter Fourth Amendment warrant requirements for seizure of allegedly obscene material, because what is "unreasonable" is to be examined in the light of the values of freedom of expression; this does not mean an adversary proceeding is needed before seizure, since a warrant may be issued ex parte.

Petitioners' analysis of the decision rendered by the Court of Appeals in this case is greatly oversimplistic. That court held that absent a search and seizure problem, a grand jury indictment charging a violation of Ohio Revised Code Sec. 2907.32(A) is not subject to dismissal solely because there was no preliminary judicial determination that the material in question was obscene. *State v. Callihan,* Slip Op. No. 5-CA-90 (Fairfield Ct. App. Fifth

District, Jan. 22, 1991) Unreported. On July 3, 1991, the Ohio Supreme Court declined to exercise jurisdiction in that case. *State v. Callihan,* 61 Ohio St.3d 1409 (1991).

The municipal court in granting Petitioners' motion to dismiss claimed reliance on the rationale used in the case of *State v. Loshin,* 34 Ohio App.3d 62 (Hamilton Ct. App. First District 1986). Number two of the syllabus in that case reads:

> 2. A preliminary finding that an item is obscene is necessary before an item can be seized by law enforcement officers. However, when a law enforcement officer buys an allegedly obscene item in the regular course of trade, a preliminary determination that the item is obscene is not required." *Id.* at 62. A motion to certify the record to the Supreme Court of Ohio was overruled on December 5, 1986, in Case No. 86-1506.

Therefore, the *Loshin* case actually supports respondent's action in this case.

In addition to the First and Fifth District Court of Appeals, the Tenth District Court of Appeals of Ohio has upheld prosecution of obscenity cases after indictment without prior judicial scrutiny. In the case of *State v. Wolfe,* 41 Ohio App.3d 119 (Franklin Ct. App. Tenth District 1987), the Court of Appeals reversed a motion to dismiss that had been granted by the trial court after the Franklin County Grand Jury indicted the defendant on two counts of Pandering Obscenity.

In that case, the Tenth District Court of Appeals upheld the State's assignment of error and reversed the decision of the trial court stating that "the trier of facts must decided whether the average person applying contemporary community standards would find that the work taken as a

whole appeals to the prurient interest..." *Id.* at 125. A motion to certify the record to the Supreme Court of Ohio was overruled on January 27, 1988, in Case No. 87-1960.

The petitioners did not cite any case, statute or criminal rule that supports their contention. In Ohio, a Grand Jury is considered to be sophisticated enough to determine death penalty cases, Racketeer Influenced and Corrupt Organization (RICO) cases involving Federal law and complex white collar crime cases. Petitioners' contention that a Grand Jury is unable to decide misdemeanor obscenity cases is simply illogical.

Petitioners also advance the argument that because the Prosecuting Attorney is an elected position, there is a political nature to his job. Therefore, they argue, he is incapable of instructing Grand Jurors on the applicable law in First Amendment cases. It is respectfully submitted that the public pressure concerning a death penalty case or serious felony crime is much more significant than a misdemeanor obscenity case like the one at bar. Further, in Ohio, all Judges are elected and would likewise be subject to the same political pressure.

There is no suggestion in the record that the Grand Jury in this case was improperly instructed. Absent any evidence to the contrary, the trial court and all reviewing courts must conclude that the Grand Jury was properly instructed on the law.

Petitioners have presented several matters that are not germane to this case. The size of attorneys fees in other cases and opinions advanced by newspaper editorialists have no relevance to this case. Perhaps those matters are appropriate in the legislative arena, but not in a criminal prosecution.

There is no requirement under Ohio law that a Judge

find probable cause before a prosecution can commence. Petitioners presented no contrary authority to the case of *State v. Wolfe, Supra* where prosecution by indictment was permitted. Further, Petitioners did not address the clear authority granted in Ohio Revised Code Section 2939.08 that authorizes a Grand Jury to inquire of all offenses committed within the county.

Petitioners correctly cite the case of *Miller v. California,* 413 U.S. 15 (1973) which states that a jury applying contemporary community standards must decide if an item is obscene. Apparently, Petitioners believe a trial jury can make this determination, while a Grand Jury cannot. Petitioners seem to say that only a Judge can make the prior determination that an item is obscene before an arrest warrant is issued. The respondent submits, however, that a Grand Jury of nine citizens is better able to determine contemporary community standards than one Judge. Petitioners' argument is both illogical and unsupported by law. The method employed in this case made it more likely that contemporary community standards would be utilized before a prosecution commenced, and it provided more protection than is constitutionally necessary for the Petitioners.

Although substantive First Amendment issues are alleged in this petition, the narrow issue presented in this appeal is primarily a procedural one. If the petitioners prevail on their argument in this case, the logical extension will require prior adversarial proceedings before a crime can be charged whenever First Amendment issues arise. The United States Congress or the Ohio General Assembly could choose to require those additional procedural safeguards but have not chosen to do so. Until its legislature enacts those procedures, prior judicial intervention is not required in Ohio before a prosecution for pandering obscenity can commence.

CONCLUSION

For the reasons advanced in the foregoing brief of Respondent, it is respectfully submitted that the writ of certiorari should not issue in this case.

Respectfully submitted,

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